

is almost similar to that in *Yap Liow Swee v. Public Prosecutor*⁽¹⁾. There the accused was convicted on a charge of driving a bus "recklessly or negligently in a manner which was dangerous to the public". On appeal, it was held that the conviction was bad for duplicity which amounted to illegality that could not be cured under section 422 of the Criminal Procedure Code. Though unlike section 45(i) of the Motor Vehicles Enactment of which *Yap Liow Swee's* case (*supra*) was concerned, the offence of "negligent driving" was not made an offence under section 28(1) of the 1960 Ordinance, the principle enunciated there nevertheless applies. On the issue of whether the duplicity in the charge was a mere irregularity which could be cured, or an illegality, Terrell Ag. C.J. (S.S.) said (at 226):

"But in a case like the present the prosecution do not set out to prove both recklessness and negligence, but merely one or the other. Accordingly the accused is embarrassed in his plea and if he is convicted he is left in doubt as to the offence of which he has been convicted.

I have no doubt therefore that duplicity of this kind is an illegality, ..."

Cussen J. said (at 227):

"Finally I do not consider that this is an irregularity curable under section 422 of the Code

It is a contravention of an express provision of the Code, i.e. section 163; it is a matter of substance and not of form; it creates uncertainty and embarrassment; it is a charge to which it is impossible to make a simple plea; it is an illegality."

In *The King v. Surrey Justices ex parte Witherrick*⁽⁴⁾ the appellant was convicted on an information which charged him with driving "without due care and attention or without reasonable consideration for other persons using the road." It was held that the conviction was bad for duplicity, the appellant having been charged with those two offences in the alternative. In his judgment Avory J. said (page 452):

"It is an elementary principle that an information must not charge offences in the alternative, since the defendant cannot then know with precision with what he is charged and of what he is convicted and may be prevented on a future occasion from pleading *autrefois convict*."

In *R. v. Wilmot*⁽³⁾ the appellant was convicted on a count that he "drove a motor car recklessly, or at a speed or in a manner which was dangerous to the public" It was held on appeal, applying *The King v. Surrey Justices ex parte Witherrick*,⁽⁴⁾ *supra*, that the count was bad for duplicity and that the conviction must be quashed.

A But even if the duplicity is one of form and an irregularity curable under section 422 of the Criminal Procedure Code as contended by the learned Deputy Public Prosecutor, I am of the opinion that a failure of justice had occasioned. The appellant, who incidentally was unrepresented at the trial, had been prejudiced and embarrassed by the duplicity of the charge in his defence. Furthermore, he was found guilty and convicted not on one of the two alternative offences but rather on the defective charge as framed. This is clear from the judgment of the learned trial Magistrate at page 4 in which he said: "I find him guilty of the offence *as charged* and enter a conviction against him on the same." (Emphasis added).

B For the above reasons, this appeal is allowed. The conviction is quashed and the sentence and disqualifications are set aside. I order the appellant to be retried before another magistrate.

C In the light of the order made, I do not propose to deal with the other grounds of appeal.

E *Conviction quashed and sentence set aside.
Retrial ordered.*

SATVINDER SINGH v. PUBLIC PROSECUTOR

F

[A.C.J. (Mustapha Hussain J.) May 29, 1986]

[Seremban – Criminal Application No. 2 of 1986]

G *Criminal Law and Procedure – Detention order – Application for – Powers of the Registrar of Sessions Court and Magistrate co-extensive – Order of Magistrate quashing order of Registrar was null and void – Criminal Procedure Code (F.M.S. Cap. 6), s. 117.*

Jurisdiction – Powers of Magistrate and Registrar co-extensive – Order of Magistrate quashing order of Registrar null and void.

H

I On April 23, 1986, the applicant was taken before the Registrar of the Sessions Court, Seremban, by an Anti-Corruption Agency officer who applied for a detention order against the applicant under section 117 of the Criminal Procedure Code. At the hearing of the application, the applicant was represented by his counsel. After submissions by the counsel the Registrar made an order for the applicant to go to the Anti-Corruption Agency Office to give a statement and be released thereafter. However, the applicant was later brought before a Magistrate at Seremban and an application was made for an order of one week's detention under section 117 of the Criminal Procedure Code. The learned Magistrate made an order of four days' detention of the applicant. The applicant then through his counsel filed an urgent application before the present court seeking

an order to set aside the order of detention and to reinstate the order of the learned Registrar.

Held: since the powers of the learned Registrar and the learned Magistrate are co-extensive the order of the learned Magistrate (the second order) in effect quashed the earlier order (first order) of the learned Registrar. Nowhere in the Court of Judicature Act, 1964 or the Subordinate Courts Act, 1948 does it spell out the appellate jurisdiction of the 1st Class Magistrate over the 2nd Class Magistrate *i.e.* the learned Registrar. As such the purported exercise of the appellate powers by the 1st Class Magistrate in this case was null and void. Accordingly, the order of the learned Magistrate should be set aside and the order of the learned Registrar restored.

[*Editorial Note:* The respondent has appealed to the Supreme Court against the decision of the court in this case *vide* Mahkamah Agung Rayuan Jenayah No. 24/1986].

CRIMINAL APPLICATION.

Christopher Fernando for the applicant.

Mohamed Zaki bin Mohamed Yasin (Deputy Public Prosecutor) for the Public Prosecutor.

Cur. Adv. Vult.

Mustapha Hussain J: On April 23, 1986, the applicant was taken before the Registrar of Sessions Court, Seremban at about 10.00 a.m. by an Anti-Corruption Agency (A.C.A.) officer who applied for a detention order against the applicant under section 117 of the Criminal Procedure Code (C.P.C.).

At the hearing of the application, the applicant was represented by his counsel. After submissions that the applicant will be available at any time and be willing to give an undertaking not to interfere with witnesses, the A.C.A. officer agreed that the applicant could go to the A.C.A. office to give a statement and be released. The Registrar then made an order for the applicant to go to the A.C.A. office to give a statement and be released thereafter.

Then, about 12.00 noon the same day *i.e.* April 23, 1986, the applicant was brought before a Magistrate in Seremban, by the same A.C.A. officer who made an application for an order of one week's detention under section 117 of the C.P.C. The learned Magistrate made an order of four days' detention of the applicant. The applicant then telephoned his counsel who on the same afternoon filed an urgent application before this court seeking an order to set aside the order of detention made by the learned Magistrate and to

A reinstate the order given by the learned Registrar of the Sessions Court in the first instance.

B At the hearing of this urgent application that same afternoon on April 23, 1986 the learned Deputy Public Prosecutor sought an adjournment of the hearing in order to enable him to file an affidavit in reply. The court adjourned the hearing to April 28, 1986 and ordered the applicant to be released on bail in the sum of \$1,000/- in one surety pending the hearing of the application.

C The Registrar of a Sessions Court is gazetted as a 2nd Class Magistrate. His powers though not as wide as those of a 1st Class Magistrate, are co-extensive with those of the 1st Class Magistrate. The powers and jurisdiction of a 2nd Class Magistrate for imposing fines and imprisonment are lower than those of a 1st Class Magistrate. But as far as the issue of orders for detention under section 117 of the C.P.C. is concerned, the powers of the 1st and 2nd Class Magistrates are the same.

E In the instant case, though the learned Registrar did not issue an order of detention when the applicant was first produced before him as sought by the A.C.A. officer, he did indeed make an order directing the application to go to the A.C.A. office to give a statement and he be released thereafter.

F The order of the learned Magistrate whereby he ordered the detention of the applicant for four days, was also an order. Since the powers of the learned Registrar and the learned Magistrate are co-extensive, the order of the learned Magistrate (the second order) in effect quashed the earlier order (first order) of the learned Registrar. Nowhere in the Court of Judicature Act, 1964 or the Subordinate Courts Act, 1948, does it spell out the appellate jurisdiction of the 1st Class Magistrate over the 2nd Class Magistrate. As such the purported exercise of the appellate powers by the 1st Class Magistrate in this case was null and void.

H Accordingly, I set aside the said order of the learned Magistrate, leaving the order (first order) of the learned Registrar to stand.

Order accordingly.

I Solicitors: *Gunaretnam & Co.*